

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**TESFALEDET Y TEFAY**  
Claimant

**APPEAL NO. 15A-UI-02032-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABM LTD**  
Employer

**OC: 02/09/14**  
**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 12, 2015, reference 06, decision that allowed benefits to the claimant, provided he was otherwise eligible, and that held the employer's account could be charged for benefits; based on an Agency conclusion that the claimant had been discharged on January 20, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on March 16, 2015. The claimant, Tesfaledet Tesfay, participated. Greg Stearns, Human Resource Manager, represented the employer and presented additional testimony through Maura Cardenas, Account Manager. Tigrinya-English interpreter Michael Brannon assisted with the hearing. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant is required to repay benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by ABM, Ltd., d/b/a Service Master Green, as a full-time janitor assigned to the Methodist Hospital complex in Des Moines from June 2014 until January 21, 2015 when the employer discharged for intentionally causing damage to a door. The conduct that triggered the discharge occurred during the claimant's shift that started on January 19 at 5:30 p.m. and that ended at 2:00 a.m. on January 20. During the shift, the claimant intentionally

and forcefully threw a large, wheeled waste container into an automatic sliding glass door with sufficient force to knock the door off its track. The waste container was part of the equipment that the claimant used to perform his regular duties. The claimant's intentional destruction of the property was captured by the Methodist Complex's video surveillance system. The claimant was easily identifiable as the person responsible for the damage, in part because he was the only African-American performing work for the employer in that area of the complex and because the surveillance video showed him causing the damage. After the claimant damaged the door, he stood there for a while and then moved on. A supervisor later happened upon the damaged door and properly reported it.

The Service Master Green Account Manager assigned to the account was Maura Cardenas. Ms. Cardenas makes weekly visits to the Methodist Hospital complex to meet with the facilities manager. When Ms. Cardenas went to the Methodist complex on January 20, the facilities manager showed her the video surveillance of the claimant causing damage. When the claimant arrived for his shift on the afternoon of January 20, Greg Stearns, Human Resource Manager, interviewed him about the incident. At that time, the claimant said he had accidentally broken a picture, but denied that he had damaged the door. Ms. Cardenas did not know the claimant. However, as Ms. Cardenas returned to the complex on January 21, the claimant followed Ms. Cardenas into the building and Ms. Cardenas recognized the claimant as the person on the surveillance record causing damage to the door.

The claimant established a claim for benefits that was effective February 8, 2015 and received \$620 in benefits for the four-week period between February 8 and March 7, 2015.

On February 11, 2015, a Workforce Development claims deputy held a fact-finding interview to address the claimant's separation from the employment. The fact-finding interview was set for 11:15 a.m. The claims deputy could not reach either party at the time of the set for the fact-finding interview and left a message for both. Within a few minutes, the employer reviewed the voice message and returned the call. The employer was not given an opportunity to provide a statement to the claims deputy, but the claimant was given an opportunity to provide a statement.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code Section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence in the record establishes that the claimant was discharged from the employment after intentionally causing damage to an automated door. The claimant's conduct was captured on video surveillance. The object that the claimant used to cause the damage was the claimant's work tool, the waste container. The claimant's conduct in damaging the employer's client's property demonstrated a willful and wanton disregard of the employer's interests and the employer's client's interests. The act of intentionally damaging the property

constituted misconduct in connection with the employment. The claimant was discharged for misconduct. Accordingly, claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$620.00 in benefits for the four-week period between February 8 and March 7, 2015. The employer was denied a reasonable opportunity to participate in the fact-finding interview and, therefore, cannot be deemed to have failed to participate in the fact-finding interview. The claimant is required to repay the overpaid benefits. The employer will not be charged for benefits paid or for future benefits.

**DECISION:**

The February 12, 2015, reference 06, decision is reversed. The claimant was discharged on January 21, 2015 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The claimant was overpaid \$620 in benefits for the four-week period between February 8 and March 7, 2015. The claimant is required to repay the overpaid benefits. The employer will not be charged for benefits paid or for future benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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